Supreme Court, U.S.
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No. 06-406

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

CHARLES WINSTON, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the First Circuit fundamentally alter the analysis required by *Buie v. Maryland*, 494 U.S. 325 (1990) when it upheld a protective sweep of petitioner's basement by considering only the potential dangers that a reasonably prudent agent could have believed were present, and without considering the actual subjective state of mind of the searching agents, which was that they had no belief that anyone was on the premises?

2. Did the Court of Appeals for the First Circuit err when it found that the petitioner had consented to a search of his nightstand, where there had been no explicit request to search?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Charles Winston, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which reversed the decision of the United States District Court for the District of Massachusetts on his motion to suppress evidence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 444 F.3d 115 (1st Cir. 2006) and is found in the appendix at the end of this petition. A petition for rehearing *en banc* was denied by the court with Lipez, J., dissenting. A copy of the unpublished order denying rehearing *en banc* is also made a part of the appendix. The unpublished memorandum and order of the District Court, Ponsor, J., is similarly reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on April 21, 2006. A Petition for Rehearing *En Banc* was denied on June 16, 2006. The Judgment of the Court was certified and issued as a mandate on June 23, 2006. This petition is filed within ninety days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution, Amendment IV.

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

STATEMENT OF THE CASE

On October 14, 2003 a federal grand jury sitting in Springfield, Massachusetts, returned a second superceding indictment charging the petitioner Charles Winston with conspiracy to possess with intent to distribute cocaine, cocaine base and heroin in violation of 21 U.S.C. 846 and possession with intent to distribute cocaine in violation of 21 U.S.C. 841 (a)(1). The only substantive crime charged to petitioner had allegedly taken place ten months earlier, in December of 2002. The conspiracy had been over at least since February of 2003 when many of its principal players were arrested.[1]

On October 15, 2003, agents executed a warrant for the petitioner's arrest at his home at 110 Carr Street in the City of Springfield, Massachusetts. Prior to attempting to execute the arrest warrant, the agents set up surveillance around petitioner's home. They knew that petitioner lived at this address as a result of inquiries with the Massachusetts Registry of Motor Vehicles. In addition, some of the agents recognized his distinctively painted blue BMW truck parked in front of the residence. The agents originally intended to wait for the petitioner to leave the premises in order to effectuate his arrest. However, after waiting for approximately an hour and a half, and observing no suspicious activity or anyone entering or leaving the house, they decided to approach the residence.[2] Agent Burns and one group of agents went to the rear of the residence in order to seal off any possible escape routes. Agent Wales and another group of agents approached the front door and knocked on 110A, the right side of the duplex. A young woman, later identified as Elizabeth Ortiz, the petitioner's girlfriend, answered the door. Wales asked if she knew

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[1] Petitioner was not charged in the original indictment or in the first superceding indictment.

[2] The house was a duplex. No activity was observed on either side.

who drove the BMW parked out front. Ortiz denied knowing the answer to this question and suggested that he knock at the other side of the duplex. The agents went to the adjacent door and knocked at 110B for about five minutes, but received no response.

In the absence of any activity, Agent Burns returned from the rear of the building just as Agent Wales again knocked at the door of 110A. When Ortiz opened the door again, Agent Burns recognized her as the defendant's girlfriend and confronted her with that fact. Ortiz became visibly anxious at being recognized by Burns and the Agents concluded that the petitioner was in the home. They told Ortiz that they had a warrant and slipped past her into the foyer of the small dwelling unit. As Agent Wales did this, he yelled out, "Chuck!" Petitioner immediately responded, "Up here." Wales then ascended a stair case that was a few feet from and directly in front of the front door. Other agents followed. At the top of the stairs, Wales saw a small child. Petitioner was standing a few feet away in a small hallway, talking on a cellular telephone. Wales ordered the petitioner to drop the phone and he complied. Within fifteen to twenty seconds of entering the building, petitioner was handcuffed and placed under arrest. Once he was under arrest, petitioner was asked to provide identification.[3] Petitioner responded that he had none on his person and that it was in the nightstand in the bedroom. One of the agents entered the petitioner's bedroom to look for the nightstand but could not locate it due to large piles of clothing throughout the room. Petitioner was then taken with his hands still handcuffed behind him, into the bedroom, where he gestured with his shoulder towards the nightstand. An agent opened the nightstand and found a wallet

[3] The request for identification was made despite the fact that he had responded when his name was called, Agent Burns knew him from a prior arrest, and Agent Wales had seen pictures of him. There was really no doubt that he was the person named in the warrant.

sitting on top of a wad of cash. No further description of the amount or denominations of the money was reported at that time.

Meanwhile, when Wales went up the stairs in response to petitioner's voice, Agent Martin went through the living room and kitchen and descended a flight of stairs into the basement. After petitioner was in custody, Agent Burns, who had initially followed Wales upstairs, followed Martin downstairs and found him with a safe that had been located, "through a laundry area into another part of the basement and around to the side and back of the furnace." Memorandum and Order Regarding Defendant's Motion to Suppress Evidence at 6. [Hereinafter Memorandum and Order]. Martin pointed to the safe that he had apparently found underneath a blanket or comforter.[4] The safe was 24 inches high by 17 inches wide by 27 inches deep. At the hearing on the motion to suppress, the agents took the position that when completely covered by the blanket, the space occupied by the safe appeared large enough to hide a crouching person.

Based on the observations of the wad of cash and upon the presence of the safe in the basement, the agents applied for a search warrant for the home. The warrant was issued and the agents later seized the safe and the cash that was seen in the nightstand pursuant to it. During the search of the residence, they also discovered a handgun beneath a bed, in a bedroom other than the one in which the cash was observed.

After hearing testimony from Agents Wales and Burns and taking a view of the petitioner's residence, including the basement, the District Judge granted the motion to suppress. The Court found that while it was not impermissible to ask an arrestee

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[4] Martin never testified at the motion to suppress, therefore the court did not have the benefit of his thinking as he traversed the basement and observed the blanket covered safe.

for identification, the Fourth Amendment created no exception to the warrant and probable cause requirements that would have permitted the agents to initiate a general search for identification. The court expressly concluded that the search of the nightstand could not be justified as incident to arrest and that the petitioner had not consented to the search. The Court also found that there was no need to search the basement for the defendant since he was taken into custody immediately upon 'the agents' entry of the apartment. He concluded further that there was no need for a "protective sweep" since "they had no reason to suspect that there were others who might pose a threat to the officers in the apartment." *Memorandum and Order at 13.*

The Government appealed the court's ruling and the United States Court of Appeals for the First Circuit reversed in a 2-1 vote. *United States v. Winston*, 444 F.3d 115 (1st Cir. 2006). Judge Stahl dissented from the majority opinion insofar as it found a valid protective sweep. Winston's Petition for Rehearing *En Banc* was denied with Judge Lipez dissenting, again on the issue of the validity of the protective sweep.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Protective Sweep

In *Maryland v. Buie*, 494 U.S. 325 (1990), this court carved out the "protective sweep" exception to the Fourth Amendment's warrant requirement. In doing so, the court made clear that a premises search would not be permitted anytime someone was arrested within their home. Instead, this court indicated that it would require a searching agent to possess specific articulable facts which, taken with the rational inferences from those facts, reasonably warrant the agent in believing that the area swept harbors an individual that poses a danger to the agent or others. *Buie*, 494 U.S. at 327. In the case at bar, the searching agents candidly admitted during their testimony at the hearing on the motion to suppress evidence that they had no reason to believe that anyone—dangerous or not—was anywhere on the premises at the time they swept the basement of petitioner's home. The District Judge so found.

The Court of Appeals reversed. The appellate court was able to reach the conclusion that it reached only by excising the subjective component of the *Buie* standard from its analysis and thereby fundamentally altering the *Buie* approach. Without considering the agents' subjective testimony, the court was able to conclude that petitioner was a "*potentially* dangerous drug dealer who had recently purchased a bullet-proof vest and firearms and had numerous *potentially* armed and dangerous cohorts,"[5]

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[5] The appellate court also took liberty with the facts. The District Judge made no finding that the petitioner had recently purchased firearms and a bullet proof vest. In fact there was no such testimony. An agent testified that an informant *had recently told him* that petitioner had done these things but there was no time frame as to when or where this had happened. The judge may well have been skeptical of the source of the information since no charges were ever brought against

apparently implying that one or more could have been on the premises. [Emphasis supplied]. As Judge Stahl's dissent points out however, the majority's theoretical concerns were belied by the lack of such concerns by the agents on the scene. The agents who were actually at the scene and who actually conducted the sweep explicitly stated that they had no reason to believe that there was anyone else on the premises.

Similarly, the circuit court's conclusion that a "...reasonably prudent agent *could believe* 'that there was a distinct possibility that a man was hiding in the [basement].' (*citing* United States *v.* Martins 413 F.3d 139, 150 (1st Cir. 2005)) is inapposite. [Emphasis supplied]. The proper issue in analyzing a protective sweep is not what a reasonably prudent agent could have thought but what the agents on the scene actually thought and whether those thoughts were objectively reasonable. Again, the record is clear that no agent had any facts upon which he could base a belief that someone was in the basement or for that matter, anywhere else in the residence.[6]

The First Circuit's elimination of any subjective component of the Buie analysis effectively eviscerates its core holding. As Judge Stahl pointed out, it essentially permits a protective sweep based on a lack of information. If Buie itself was not clear that this is not permitted, subsequent circuit decisions have made it clear. The Second and Sixth Circuits have explicitly

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Winston based on these allegations. Furthermore, as indicated previously, the conspiracy had been over for at least eight months. In fact, virtually all of petitioner's co-conspirators were already in custody.

[6] The motion judge was understandably skeptical of the claim that the search of the basement was based upon a concern about others on the scene who could endanger the arresting agents. He noted that the agents who placed petitioner under arrest did not sweep the bedrooms and bathroom that were adjacent to where he was taken into custody.

stated that "lack of information cannot provide an articulable basis upon which to justify a protective sweep." *United States v. Gandia*, 424 F.3d 255, 264 (2nd Cir. 2005), *United States v. Moran Vargas*, 376 F.3d 112, 117 (2nd Cir. 2004), *United States v. Colbert*, 76 F.3d 773, 778 (6th Cir. 1996). The Third Circuit and the Eleventh Circuit have expressed similar reasoning. *See Sharrar v. Felsing*, 128 F.3d 810, 825 (3d Cir. 1997), *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999).

This court should grant the writ to reaffirm that the *Buie* standard is both subjective and objective and that protective sweeps cannot be based upon a lack of information. In the absence of such action the First Circuit standard will stand in conflict with the Second, Third, Sixth and Eleventh circuits.

The Nightstand Search

In finding that petitioner consented to a search of his nightstand, the Circuit court ignored its own longstanding rule that a District Judge's findings on voluntariness and consent will be reviewed only for clear error and will be upheld so long as they are fairly supported by the evidence. See United States v. Weidul, 325 F.3d 50 (1st Cir. 2003), *citing* United States v. Laine, 270 F.3d 71, 75 (1st Cir. 2001)). The Court found that petitioner had impliedly consented to the search of his nightstand when he gestured with his shoulder despite the fact that he was never explicitly asked for permission to search for his identification in the nightstand. Other circuits have refused to find an implied consent where there is no express or implied request to search. For example, in United States v. Jara, 86 F.3d 383, 290 (5th Cir. 1996) the court rejected a claim of implied consent where there was no express or implied consent to search. Similarly in the Ninth Circuit case of United States v. Shaibu, 920 F.3d 1423 (9th Cir. 1990), the court declined to find an implied consent because there was no request for entry into the area that was searched. The court noted that, "[I]t is one thing to infer consent from actions responding to a police request. It is quite another to sanction the police walking into a person's home without stopping to ask permission." Id.

If left to stand, the circuit opinion with respect to the finding of implied consent will conflict with at least two other circuits. This court should grant the petition to resolve the issue of whether an implied consent to search can be found where there has been no explicit request to search.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should grant the petition and schedule this matter for briefing and oral argument.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 05-1312

UNITED STATES OF AMERICA,
Appellant,

v.

CHARLES WINSTON, JR.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, U.S. District Judge]

Before

Torruella, Circuit Judge,
Cyr and Stahl, Senior Circuit Judges.

John-Alex Romano, Attorney, Appellate Section Criminal Division, United States Department of Justice, with whom Michael J. Sullivan, United States Attorney, Ariane D. Vuono and Thomas J. O'Connor, Assistant United States Attorneys, were on brief, for appellant.

David P. Hoose, with whom Katz, Sasson, Hoose and Turnbull, was on brief, for appellee.

April 21, 2006

TORRUELLA, Circuit Judge. This is an interlocutory appeal by the government under the provisions of 18 U.S.C. § 3731 from an order of the district court suppressing evidence obtained pursuant to a search warrant. For the reasons stated hereinafter, we reverse. The district court concluded that the search warrant was based on information that was illegally obtained by government agents incident to defendant Charles Winston's ("Winston") arrest. Specifically, the court found that the observation by the arresting officers of a certain amount of cash in Winston's nightstand, as well as of a safe located in the basement of his house, resulted from an unreasonable search in violation of Winston's Fourth Amendment rights. Therefore, it found that this information could not be used to establish probable cause in support of the issuance of a valid search warrant. The court thus proceeded to invalidate the search warrant for lack of probable cause and consequently suppressed the evidence discovered thereunder, namely, $58,000 in cash, a scale with white powder residue, a hand gun, and ammunition.

I. Background

Pursuant to an investigation of a large-scale drug trafficking organization, federal agents obtained an indictment of Winston along with about twenty-five others on October 14, 2003. The indictment charged Winston with distributing cocaine on December 16, 2002 and with being part of a conspiracy to distribute cocaine between July 2002 and February 2003. Also on October 14, 2003, a warrant issued for Winston's arrest.

On October 15, 2003, agents went to Winston's house to arrest him. Some of the agents had previously seen Winston, his girlfriend, and his distinctive blue BMW. One of the agents had arrested Winston about two weeks earlier for possession of a handgun. One of Winston's codefendants had informed the agents that he had sold Winston two handguns and a bullet-proof vest.

Arriving at Winston's house, a duplex, agents saw Winston's car in the driveway of his house. The agents did not notice any other cars near the house. The agents surrounded the house and surveilled it for about an hour and a half, hoping that Winston would exit. During this time, the agents did not observe any activity in the house.

Agents then knocked on the door to Winston's house, the right half of the duplex. Winston's girlfriend answered the door, but the agents present did not know who she was. The agents asked her who owned the blue BMW. She denied knowing the owner of the car and suggested that the agents inquire next door. The agents did so, but no one responded.

About five minutes later, agents knocked again on the door to Winston's house. In the meantime, Agent Burns had walked around the house to the vicinity of the front door. When Winston's girlfriend opened the door, Agent Burns recognized her as Winston's girlfriend. The agents then pushed past her into the house.

One agent shouted "Chuck," and Winston immediately responded from upstairs "up here." Agents went up the stairs with guns drawn. They saw Winston's child near the top of the stairs and saw Winston in the hallway talking on a cell phone. This occurred within twenty seconds of entering the home. Agents ordered Winston to drop the phone. Winston complied, and agents put him in custody without a struggle. Agents did not conduct a protective sweep on the second floor. During this time, Agent Burns went upstairs to bring the child downstairs and out of harm's way.

After handcuffing Winston with his hands behind his back, agents asked him for identification. Winston told them that it was in the nightstand in his bedroom. Because of clothes piled in the bedroom, the agents could not find the nightstand so they brought

Winston into the bedroom and asked him again. Winston pointed to the nightstand with his shoulder. The agents opened the drawer in the nightstand to find Winston's wallet on top of a large amount of cash.

Trooper Martin had entered the house at the same time as the group of agents who proceeded to the second floor, but he moved immediately through the living room and kitchen until he came upon a set of interior stairs which lead to the basement of the house. Thereupon he proceeded down the stairs into the basement for the purpose of securing that area. Upon reaching the basement floor he observed a furnace, and behind it an object covered by a blanket. He proceeded to remove the blanket and discovered a safe which measured approximately twenty-four inches in height by seventeen inches in width by twenty seven inches in depth. After having brought the child to the first floor, Agent Burns followed Trooper Martin into the basement where Trooper Martin showed him the safe. These two agents went back upstairs and, in Winston's presence, informed the other agents of their discovery of the safe. Winston then stated, "That's my safe."

II. Protective Sweep of the Basement

The Fourth Amendment protects individuals from unreasonable searches and seizures. *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990). Generally, the search of an individual's house without a search warrant is unreasonable and violates the Fourth Amendment. Id. Exceptions to this general rule arise when the benefits to the public interest outweigh the individual's privacy right. Id. One such exception is a protective sweep conducted in conjunction with the arrest of an individual in his home. Id. at 327.

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Id. To prevent law enforcement from abusing the protective sweep by using it as a pretext for searching

an individual's home, the Supreme Court has limited its use. First, law enforcement officers conducting the sweep must have a reasonable suspicion of danger: "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 334 & n.2. The reasonable suspicion standard is "considerably less demanding than the level of proof required to support a finding of probable cause," United States v. Martins, 413 F.3d 139, 149 (1st Cir. 2005), but must be based on more than an unfounded speculation, United States v. Cook, 277 F.3d 82, 85 (1st Cir. 2002). Second, the scope of a protective sweep must be limited to its purpose. The sweep "may extend only to a cursory inspection of those spaces where a person may be found." Buie, 494 U.S. at 335. Additionally, the duration of the sweep must be "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." Id. at 335-36.

The district court in this case held that the protective sweep violated the Fourth Amendment. We review the district court's factual findings for clear error. United States v. Palmer, 203 F.3d 55, 60 (1st. Cir. 2000). We review de novo the constitutional question of whether the protective sweep violated the Fourth Amendment. Id.

A. Reasonable Suspicion

The district court found that the agents did not have a reasonable suspicion to believe that a dangerous person could be in the basement. The government contests this finding and puts forth a number of facts to support a finding of reasonable suspicion. First, the agents had information to believe that Winston was armed and dangerous and possibly with armed and dangerous

cohorts. Winston was indicted, along with twenty-five others, for distribution of cocaine as part of an investigation of a large-scale cocaine trafficking organization. One of the other defendants informed agents that he had sold Winston two handguns and a bullet-proof vest. One of the agents present had also previously arrested Winston after a traffic stop for possession of a handgun. Second, the government finds significant that Winston's girlfriend initially denied having knowledge of Winston's car. From this deception, the government argues that a reasonable agent could believe that the purpose of the deception was to gain time to allow Winston and/or his cohorts to hide, exit the house through another door or window, or prepare an ambush. Third, the government notes that when agents called out Winston's name, Winston responded "up here" from the second floor. The government found it unusual that Winston responded so casually from the second floor when agents forcibly entered his house and argues that a reasonable agent could believe that Winston's unusual response was part of a scheme to escape or to allow others in the drug organization to escape or ambush the agents.

In response, Winston argues that the circumstances would lead agents to believe that no others were present in the house. First, Winston notes that agents surveilled the house for an hour and a half and, during this time, saw no indication of anyone's presence in Winston's house. However, since Winston, his girlfriend, and their child were in the building but unobserved, others could easily have been in the home. Next, Winston finds significant that an agent testifying at the suppression hearing could not recall if there were other cars parked in Winston's driveway or near Winston's home, implying that there were no other cars and thus no sign of other people being present in Winston's house. Winston argues that if cars were present the agent would have noticed them and would have been able to recall this fact. We

refuse to ascribe such meaning to the agent's failure to recall whether cars were present, especially given the lack of other relevant information. Finally, Winston points out that when the agents entered the house, they did not see or hear any evidence of another person. We do not find this highly relevant since the purpose of a protective sweep is to protect agents from concealed threats.

We find that, based on the information presented above, the agents had a reasonable suspicion to believe that a dangerous person could be in the basement. Underlying a protective sweep is the "'risk of danger in the context of an arrest in the home' due primarily to the reality that there may be 'unseen third parties in the house.'" United States v. Lawlor, 406 F.3d 37, 41 (1st Cir. 2005) (quoting Buie, 494 U.S. at 333, 336). Winston was a potentially dangerous drug dealer who had recently purchased a bullet-proof vest and firearms and had numerous, potentially armed and dangerous cohorts. This risk was compounded by the deceptive actions of Winston's girlfriend, which gave any potential occupants inside the house five minutes to conceal themselves or prepare an ambush. Further, given that Winston knew that agents had forcibly entered his house, his casual response inviting them upstairs was unusual. One would expect Winston either to evade the agents or to surrender to them by coming downstairs or responding that he was on his way down. His casual, inviting response could lead a reasonable agent to believe that it was part of a scheme to lead the agents away from the basement because others were hiding there waiting to escape or launch a surprise attack on the agents. "The fact that the sweep revealed that there was no person [in the basement] has no bearing on whether [agents were] justified in conducting the sweep in the first place." Id. at 42 n.5. We think that a reasonably prudent agent could believe "that there was a distinct possibility that a man was hiding in the

[basement]." Martins, 413 F.3d at 150. When agents arrest an armed criminal with known cohorts in his home, they put themselves in a dangerous situation and must be able to protect themselves. In these situations, the experienced perceptions of law enforcement agents deserve deference and constitute a factor in our reasonable suspicion analysis. Id. at 150 & n.4.

B. Scope

Additionally, the district court found that the scope of the sweep was excessive because agents immediately arrested Winston, and agents could have protected themselves by guarding the top of the stairs. This finding, however, begs the point. Obviously, the agents had the right to protect themselves not only from Winston but from all other circumstances reasonably within the scope of the dangers they were facing, i.e., an arrest involving a member of a drug organization with multiple constituents, not all of whom had been accounted for, who were likely to be armed, as Winston was, in a setting which presented an opportunity for ambush or similar violent conduct against the arresting officers.

The scope of the protective sweep in this case, in both location and duration, was within the bounds set forth by the Court in Buie. Officers may make only "a cursory inspection of those spaces where a person may be found." Buie, 494 U.S. at 335. Here, agents walked immediately through the first floor and basement and moved a blanket covering a space large enough for a person to hide. We find that their actions constituted a limited and cursory inspection.

Winston argues that the agents could have protected themselves by guarding the top of the basement stairs. As judges trained in the law, and not in apprehending suspects, we cannot determine in this situation how the agents could have gone about protecting themselves, but it does not seem logical or reasonable that given the circumstances previously explained, the agents

would leave such an obvious hiding place, from which harm could be dispensed, unsecured. Even if Winston were correct, the validity of a protective sweep "does not turn on the availability of less intrusive investigatory techniques." United States v. Sokolow, 490 U.S. 1, 11 (1989).

Winston also notes that the agent did not descend cautiously into the basement and that agents did not conduct a protective sweep of the second floor, suggesting that the agents did not actually fear for their safety and that the protective sweep was merely a pretext to search Winston's house. We do not agree with Winston that these particular choices by the agents necessarily indicate that the sweep was pretextual. An agent could determine that it would be safer to move silently and swiftly into the basement instead of announcing his presence. Further, agents need not coordinate their intentions to conduct a protective sweep. The validity of a protective sweep conducted by the agent on the first floor is not negated by the separate decision of agents on the second floor that a protective sweep is not there necessary. Regardless, the agents' subjective intentions are not relevant as long as the protective sweep was objectively reasonable. Lawlor, 406 F.3d at 43 n.8 (citing Whren v. United States, 517 U.S. 806, 813 (1996)). Furthermore, we are not here to second guess the agents as to how to conduct a protective sweep, for as stated, we are not qualified to do so nor is that within the scope of our judicial duties. We are able, however, to pass upon whether their actions were objectively reasonable given the circumstances and constraints within which they operated. We believe they were.

The duration of the sweep must be "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." Buie, 494 U.S. at 335-36. The facts show that Winston's house was small and that Trooper Martin moved

quickly into the basement. After arresting Winston, Agent Burns went into the basement to inform Trooper Martin of the arrest, and all agents departed. There was no evidence that the agents lingered longer than necessary to arrest Winston.

C. Statement of Ownership

The district court also suppressed Winston's statement admitting his ownership of the safe, because it arose from the illegal observation of the safe. Given our validation of the safe's discovery and Winston's failure to otherwise contest this statement on appeal, we conclude that this admission was also improperly suppressed.

III. Consent to Search the Nightstand

Another exception to the search-warrant requirement is a search by consent. United States v. Forbes, 181 F.3d 1, 5 (1st Cir. 1999). In order to establish this exception, "the government must prove valid consent by a preponderance of the evidence." Id. To be valid, a consent to search must of course be voluntary. Id. The consent may be express or inferred from conduct. United States v. Miller, 589 F.2d 1117, 1130 (1st Cir. 1978) (finding defendant's unlocking of a suitcase to be implied-in-fact consent for officers to search the suitcase). "The existence of consent and the voluntariness thereof are questions of fact to be determined from all the circumstances surrounding the search." Id. We review the district court's findings on voluntariness and consent for clear error. Id. We will uphold the district court's finding as long as it is "fairly supported" by the evidence. United States v. Laine, 270 F.3d 71, 75 (1st Cir. 2001).

The district court tersely found that Winston did not consent to the search of the nightstand that led to the retrieval of his wallet and the discovery of the cash: "His indication in response to questioning of where his wallet could be found cannot be construed as a consent to search." Clearly, Winston did not

explicitly consent to a search of the nightstand, but the government argues that Winston's actions amounted to an inferred consent or an implied-in-fact consent.

Winston points out several factors that weigh against a finding of consent: agents forced their way into Winston's home, approached him with weapons drawn, ordered him to drop his cell phone, handcuffed him with his hands behind his back, and did not read him Miranda warnings. However, it is inherently reasonable for the agents to ask Winston for identification to verify his identity. See Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.").

The facts clearly support a conclusion to the effect that Winston consented to the search of the nightstand. Upon being asked for verification of his identity, he verbally indicated that his wallet was in the nightstand in the bedroom. The agents could not immediately locate the nightstand in the bedroom, so they escorted Winston into the bedroom. When asked again for the location of his identification, he indicated with a shoulder movement in the direction of the nightstand. While the agents did not explicitly ask for permission to open the drawer to retrieve Winston's identification, the circumstances described would reasonably lead the agents to conclude that Winston was consenting to the opening of the drawer in the nightstand to allow for the retrieval of his wallet and identification. Any other conclusion would allow Winston the benefits of sandbagging the agents into committing a violation of his rights. Given the unquestioned facts, we see no reason why we should go along with such a deception.

In United States v. Cepulonis, agents bearing shotguns arrested and handcuffed Cepulonis outside his hotel room. 530 F.2d 238, 243 (1st Cir. 1976). Cepulonis requested to speak with

his wife and child in the hotel room, and the agents allowed him to enter the hotel room in their company. Id. After conducting a protective sweep, the agents asked Cepulonis if there were any weapons in the room, to which he responded, "no, go ahead, search." Id. at 244. We upheld the district court's finding that the search was consensual. Id. Here, the inherent coerciveness of the situation is similar in that Winston was handcuffed, agents had drawn weapons, and family members were present. Favoring a finding of implied-in-fact consent in this case is the fact that a request for information about the location of Winston's identification is much more benign than a request for information about the location of weapons.

We do not find it of decisive significance that in response to the agent's question as to the location of the nightstand, Winston motioned with his shoulder rather than speaking. In other situations, we have found implied-in-fact consent based entirely on silent actions. See Robbins v. MacKenzie, 364 F.2d 45, 48 (1st Cir. 1966). In Robbins, officers announced themselves at the door to a robbery suspect's apartment and asked to speak with him. Id. at 47. The suspect silently opened the door and walked back into the room. Id. We found that he "expresse[d] by his action as adequate a consent to entry as he would by a verbal invitation." Id. at 48.

We do not lightly reverse a district court's holding when reviewing for clear error. We note that the facts surrounding the search of the nightstand are undisputed, and thus we are not disturbing the district court's findings of historical facts or credibility. Given the record as determined by the district court, we find that the district court's holding that Winston's acts did not constitute an implied-in-fact consent to open the drawer of the nightstand is not fairly supported by the record.

The district court did not determine whether Winston's actions surrounding the search of the nightstand were voluntary.

We have no trouble finding that Winston acted voluntarily.[1] As described above, an in-home arrest pursuant to a search warrant is an inherently coercive situation, but such a situation does not preclude a finding of voluntariness. United States v. Watson, 423 U.S. 411, 424 (1976). The subject matter of the request, Winston's identification, weighs heavily in favor of voluntariness. The agent testified that he routinely asks for identification when making arrests, and such a request is eminently reasonable. The mundaneness of identification makes it unlikely that agents would bother to use coercive methods to obtain it. Further, because Winston immediately responded to the agents' requests, the evidence shows that Winston merely answered their questions and was not coerced into doing so.

IV. Conclusion

The district court erred in suppressing the evidence obtained pursuant to the search warrant and Winston's statement claiming ownership of the safe. The motion to suppress is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

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[1] Because we find no serious question as to whether Winston acted voluntarily, we see no need to remand to the district court to make this determination. See United States v. Byram, 145 F.3d 405, 407 (1st Cir. 1998).

Reversed and Remanded.

(Concurring and Dissenting opinion follows)

STAHL, Senior Circuit Judge, concurring in part and dissenting in part. The majority's decision today misapplies precedent that dictates what is permissible under the modest "protective sweep" doctrine announced in Maryland v. Buie, 494 U.S. 325 (1990). The two officers who testified at the suppression hearing each stated that they had no reason to think that anyone dangerous (other than Charles Winston himself) was in the house where the safe was found. The government on appeal urges a number of factors it speculates might have given an officer grounds to fear an ambush here, including the fact that Winston was known to own and carry a firearm, but I do not believe that these factors add up to the degree of suspicion that Buie requires before a protective sweep may be conducted. The district court correctly concluded that the Fourth Amendment did not permit the agents who arrested Charles Winston to conduct a protective sweep of the basement of the apartment in which they found him, and that the evidence that resulted from that search had to be suppressed. While I join the majority in holding that the search of the nightstand was constitutional, I disagree with its conclusion that the search of the basement was likewise permissible. Respectfully, I dissent.

I.

Before discussing my disagreement with the majority's position, I address the government's anterior argument that the search was not a protective sweep at all, and that the agent who searched the basement was in fact simply searching for Charles Winston. The district court found that the search of the basement

"cannot be justified by any attempt to locate the defendant" because "the agents had no need to search the basement for the defendant, having taken him into custody immediately upon entering the apartment." I would uphold the district court's factual conclusion.

At the hearing, the government relied on two witnesses, Special Agent Donald Wales, the arresting officer, and Special Agent Patrick Burns, another member of the arrest team. Notably, the state did not present the testimony of a Massachusetts State Trooper named Martin, the officer who performed the basement search and uncovered a concealed safe behind a furnace.

On the basis of the officers' testimony presented at the hearing, faithfully recounted by the district court and by the majority, it might be possible to take a number of views of what happened in the basement on the day Winston was arrested. One could surmise that Martin tore into the building and down the basement steps and quickly uncovered the safe, all before Agent Wales mounted the stairs and apprehended Winston on the second floor landing. Or one might conclude that Martin headed straight for the basement and was still there, searching for Winston and oblivious of the fact that the agents upstairs had already located him, when he discovered the safe. And it also might be possible to conclude that the apartment was so small that Martin, down in the basement, heard the ruckus upstairs, knew that Winston had been located, but continued searching nevertheless.

The district court rejected the first possibility out of hand, finding that Winston's arrest took place "within seconds" of the agents' entrance into the apartment. That left two possibilities: either Martin never gleaned that Winston had been located upstairs, or he did but continued to search anyway. On a motion to suppress evidence seized on the basis of a warrantless search, the presumption favors the defendant, and it is the government's

burden to demonstrate the legitimacy of the search. See United States v. Lopez, 380 F.3d 538, 543 (1st Cir. 2004) (citing Mincey v. Arizona, 437 U. S. 385, 390-91 (1978)). The government made its case harder, if indeed it had a case, by failing to provide the testimony of Trooper Martin himself. So long as Martin did not know that Winston had been found, he surely had a right to continue looking for him as long as his fellow officers made reasonably diligent efforts to communicate the fact of the arrest to him. But only Martin himself could have testified as to whether he had reason to believe that Winston had been found.

The court had to determine, without the benefit of Martin's testimony, whether Martin knew or did not know that his license to continue searching for the defendant had come to an end. Under the right circumstances, it would probably be reasonable to infer that an agent did not know -- but given the burden on the government, the uncertainty in this case had to be resolved in the defendant's favor. What is more, the district judge took a view of the house itself, and that fact is to be given much weight in our analysis. On the basis of the small size of the apartment as observed during the view, the district judge evidently concluded that anyone searching the basement would have been in a position to hear what was happening on the stairs to the second floor of the unit. Without Martin's testimony to the contrary, I defer to the district court in its finding that the officers "had no need to search the basement for the defendant, having taken him into custody immediately upon entering the apartment."

II.

Once Martin's authority to search for Winston himself expired, the only remaining justification for continuing his search would have been that he was searching for potential assailants hiding in wait in the basement. In my opinion, such a protective sweep was not permissible here.

When law-enforcement agents legally enter a home and arrest a criminal suspect, the suspect nevertheless retains "an expectation of privacy in those remaining areas of his house" which the police have not yet searched. Buie, 494 U.S. at 333. The majority thinks that in this case, Winston's interest in that privacy was outweighed by the searching officer's purported interest in the arrest team's safety. In so holding, it strikes a balance that is not in line with Buie or with the great mass of cases in any circuit in this area that have been decided in the years since Buie was handed down, and reaches a conclusion unsupported in the record.

Warrantless searches are "per se unreasonable...subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S 347, 357 (1967). Buie established one such exception, which permits a protective sweep incident to an arrest if the searching officer has "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] the officer in believing that the area swept harbor[s] an individual posing a danger to the officer or others." Buie, 494 U.S. at 325 (internal quotations and citations omitted).[2] The constitutionality of a protective sweep under particular circumstances is a mixed question of fact and law: we review the court's factual findings for clear error "and then review de novo its ultimate conclusion that the discerned facts constitute a sufficient legal basis to justify the conduct about which the defendant complains." United States v.

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[2] There are two Buie exceptions to the warrant requirement, of which the one claimed to apply in this case is the second, broader type discussed in the text. Under the first exception, officers are permitted to, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Buie, 494 U.S. at 334. The government is rightly not claiming that the basement search here was of a "space immediately adjoining the place of arrest."

Martins, 413 F.3d 139, 146 (1st Cir. 2005) (citing United States v. Schaefer, 87 F.3d 562, 565 (1st Cir. 1996); United States v. Tibolt, 72 F.3d 965, 969 (1st Cir. 1995)).

The Buie Court went to some effort to ensure that law-enforcement agents (as well as courts) would understand that the decision permits only limited searches and only under particular, narrow circumstances: a Buie sweep is "not a full search of the premises" and can involve only a "cursory" inspection of spaces in which a person could be found, 494 U.S. at 335; it is not a "top-to-bottom" search, id. at 336; and it is "decidedly not 'automati[c],'" id. (alteration in original) (quoting Chimel v. California, 395 U.S. 752, 766-67 (1969)). Respectful of these admonishments, we have strictly construed Buie's exceptions to the prohibition on warrantless searches.

Every one of our own cases addressing the propriety of a protective sweep has turned on the searching officer's suspicion vel non, based on some affirmative evidence, that a particular and identifiable individual, for example, the arrestee's missing accomplice or housemate, remained in the building that was searched. See Martins, 413 F.3d 139 (man whose voice answered door thought to be inside apartment); United States v. Lawlor, 406 F.3d 37 (1st Cir. 2005) (suspect's brother thought to be in house); Crooker v. Metallo, 5 F.3d 583 (1st Cir. 1993) (suspect's accomplice thought to be in house); United States v. Daoust, 916 F.2d 757 (1st Cir. 1990) (homeowner thought to be in house); see also United States v. Paradis, 351 F.3d 21, 29 n.7 (1st Cir. 2003) (protective sweep not permissible because police did not "believe that a specific individual other than the arrestee [was] present and dangerous").

Our sister circuits are widely in agreement. See, e.g., United States v. Gandia, 424 F.3d 255, 264 (2d Cir. 2005) ("Officers must point to facts that give rise to an individualized

suspicion and cannot rely solely on generalizations that suspects are usually accompanied by dangerous third parties." (citing United States v. Moran Vargas, 376 F.3d 112, 116 (2d Cir. 2004))); see also United States v. Carter, 360 F.3d 1235, 1242-43 (10th Cir. 2004); United States v. Chaves, 169 F.3d 687, 692 (11th Cir. 1999); Sharrar v. Felsing, 128 F.3d 810, 825 (3d Cir. 1997); United States v. Colbert, 76 F.3d 773, 777-78 (6th Cir. 1996); United States v. Ford, 56 F.3d 265, 269 & n.6 (D.C. Cir. 1995); United States v. Delgadillo-Velásquez, 856 F.2d 1292, 1298-99 (9th Cir. 1988) (anticipating Buie).[3]

By their own admission at the suppression hearing, the agents in this case had no information indicating affirmatively that anyone other than Winston was in the house. There was, as far as the government showed, only the defendant's car in front of the building, and no one had entered the apartment for the hour and a half that the officers spent watching the house prior to their entry. The government's only two witnesses were Wales and Burns. On cross-examination by the defense, Wales was asked: "You didn't have any reason on that morning to believe that there was any other specific person that you knew of in that apartment, is that correct?" Wales testified in reply: "I didn't have any reason to believe there was anybody in either one."[4] Similarly, Agent Burns

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[3] The Fourth Circuit has produced no cases in point. The Fifth Circuit has few, but they are consistent with the general principle I have described. See United States v. Waldrop, 404 F.3d 365, 369 (5th Cir. 2005); United States v. Muñoz, 150 F.3d 401, 411-12 (5th Cir. 1998). The Seventh Circuit is similarly consistent. See, e.g., Leaf v. Shelnutt, 400 F.3d 1070, 1088 (7th Cir. 2005); United States v. Burrows, 48 F.3d 1011, 1017 (7th Cir. 1995); United States v. Barker, 27 F.3d 1287, 1291 (7th Cir. 1994). A more permissive view is taken in the Eighth Circuit. See United States v. Cash, 378 F.3d 745, 749 (8th Cir. 2004); United States v. Horne, 4 F.3d 579, 586 (8th Cir. 1993).

[4] Wales had earlier testified that the agents had set out to look for Winston at 110-A Carr Street, but on arriving at the location had discovered that the building

was asked, "You had no information whatsoever that Mr. Winston had anybody there who would attempt to aid him or anything like that in the event of an arrest, is that correct?" Burns replied simply, "Yes."

As far as the government showed at the hearing, therefore, the officers at the arrest site that day had no information that would indicate that anyone other than Winston was in the house in which they hoped to arrest him.[5] And if Buie's admonition that its exception is not to be seen as automatic is to mean anything at all, "[l]ack of information cannot provide an articulable basis upon which to justify a protective sweep." Colbert, 76 F.3d at 778. Cf. Id. (protective sweep unjustified in part because the arresting officer "testified that he 'didn't have any information at all' when asked whether he had information that anyone was inside the...apartment prior to his decision to conduct the protective sweep"). See also Carter, 360 F.3d at 1242-43 ("Of course, there could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep, unless such sweeps are simply to be permitted as a matter of course, a result hardly indicated by the Supreme Court in Buie."); Delgadillo-Velásquez, 856 F.2d at 1298 (protective sweep was unconstitutional where officers had "no information that any other persons were in the apartment").

The majority's approval of the search here rests in large part on the arresting officers' belief that Winston had, at some point, bought two guns and a bullet-proof vest from a co-

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at 110 Carr Street had two unmarked doors. Wales' reference to "either one" was a reference to the confusion: Wales evidently did not have information about whether anyone was in either of the two apartments that might have been 110-A.

[5] Once Winston's girlfriend Ortiz opened the door, the agents of course knew that she was there, but Ortiz's presence did not make the presence of dangerous third parties more likely.

conspirator, and the report of a police officer who had detained Winston for a traffic violation and found he was carrying a handgun. These facts should have given the arrest team cause to worry that Winston himself posed a threat to them, but they did nothing to justify a belief that there was anyone else in the house with Winston on the day of his arrest. "The facts upon which officers may justify a Buie protective sweep are those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual." Colbert, 76 F.3d at 777 (emphasis added).

The majority also relies on Winston's yell (suspiciously quick) from the top of the stairs, indicating to the agents that he was on the second floor, along with Winston's girlfriend's attempt (suspiciously dilatory) to mislead the agents by denying knowledge of the car parked out front. The latter, the majority thinks, might have been an effort to delay the police while an ambush was set up, while the former could have been an effort to distract them while it was being sprung. Though not an argument offered by either of the officers in their testimony, this seems a plausible theory. In order to justify a Buie sweep, however, law-enforcement agents need more than a plausible theory that hypothesizes a third person on the premises. Nearly any indication that some third person is present might be enough -- an unaccounted-for voice behind a door, Martins, 413 F.3d at 151; movement in an upstairs window, Burrows, 48 F.3d at 1017; an extra car in a driveway, United States v. Hauk, 412 F.3d 1179, 1192 (10th Cir. 2005) -- but without any affirmative indication of this sort that a third person may be lying in wait, the police have nothing more than the "mere 'inchoate and unparticularized suspicion or "hunch"'" that the Court indicated in both Terry and Buie was insufficient to justify a warrantless

search. Buie, 494 U.S. at 332 (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).[6]

III.

For the foregoing reasons, I would affirm the decision of the district court to suppress the material seized from the safe in Winston's basement and Winston's statement made in response to the discovery of that safe. I respectfully dissent.

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[6] The government makes a pair of additional arguments in favor of admission of the evidence at issue, but both are unavailing. The first is easily disposed of: the government argues on appeal that the safe in the basement would inevitably have been found and thus should be admissible under the inevitable discovery rule of Nix v. Williams, 467 U.S. 431 (1984), but it did not make that argument to the district court and it offers no reason why we should take it up for the first time on appeal. See United States v. Dimeo, 28 F.3d 240, 241 n.3 (1st Cir. 1994); United States v. Elwell, 984 F.2d 1289, 1298 (1st Cir. 1993). For the second, the government raises the question of the applicability of the good-faith exception to the warrant requirement, announced in United States v. Leon, 468 U.S. 897, 924 (1984), which permits an officer to rely on a defective warrant if he does so in good faith. The good faith exception is inapposite here, however. The doctrine forgives an officer for the error of a magistrate or other official who issues a warrant, but is not available to an officer who objectively should have known that the information supporting the application was unconstitutionally obtained. "Leon requires not merely good faith, but objective good faith." United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989) (citing Leon, 468 U.S. at 924). I need not question the subjective good faith of the agents who searched Winston's house in order to conclude, as I do, that it would not have been reasonable for them to believe that their searches were constitutionally permissible.

the apartment before they entered it; they had no reason to suspect there were any others who might pose a threat to the officers in the apartment. Furthermore, the agents could have secured the apartment without entering the basement, since the basement was only accessible through the door from the first floor. Because there was no reason for the agents to search the basement, the officers' observations of it exceeded the limitations set by the Fourth Amendment.

Finally, the government cannot escape suppression of the evidence by invoking the good faith of the agents in these circumstances. Evidence wrongfully seized will not be excluded "where an objectively reasonable law enforcement officer relied in good faith on a defective warrant because suppression in that instance would serve no deterrent purpose." U.S. v. Brunette, 256 F.3d 14, 19 (1st Cir. 2001).

The government faces a "high hurdle" in showing that the good faith exception applies here because "critical information known to the officer [was] omitted from the warrant application." Id. Had the affidavit revealed the circumstances under which the evidence relied on for the search warrant had been obtained, the search warrant likely would not have issued. While there is no indication that any government agent intentionally manipulated the process in deliberate bad faith, the evidence is clear that a reasonable officer should have known that the observations of the cash and the safe violated constitutional boundaries. Suppressing the evidence under these circumstances serves a proper, and important, deterrent purpose. See Id.

As for the statements made by Mr. Winston during his arrest, the court will suppress one of those as well. Mr. Winston would not have made the statement regarding his ownership of the safe had the agents not conducted the improper search. See Nix v. Williams, 467 U.S. 431, 441 (1984) (discussing the exclusionary

rule and how it includes "fruit from the poisonous tree," or in other words "the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence"). The other two statements were not the fruit of any constitutional violation and need not be suppressed.

IV. CONCLUSION.

For the above reasons, the defendant's Motion to Suppress is hereby ALLOWED. The evidence obtained pursuant to the search warrant and the one statement made by the defendant regarding the safe will not be admitted during the trial on 04-CR-30026. This ruling does not appear to affect any evidence in 03-CR-30008. The government is ordered to notify the court on or before February 25, 2005 regarding its intent to proceed on 04-CR-30026.

It is So Ordered.

MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
) C.R. No. 03-30008-MAP
v.) C.R. No. 04-30026-MAP
CHARLES WINSTON, JR.)

MEMORANDUM AND ORDER REGARDING
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE
(Docket No. 499)[1]
January 28, 2005

PONSOR, D.J.

I. INTRODUCTION.

On October 15, 2003 at 110 Carr Street in Springfield, Massachusetts, federal and state law enforcement agents arrested the defendant Charles Winston, Jr., following the return of an indictment charging him and more than two dozen others with participating in a conspiracy to distribute controlled substances. During the course of the arrest, agents observed a quantity of cash in a night stand drawer located in the bedroom used by the defendant, as well as a safe in the basement of the residence. These two observations then formed the basis for a search warrant that was executed later that day and that resulted in the seizure of a scale with cocaine residue, a firearm and a large quantity of cash.

[1] Defendant Winston's Motion to Suppress, along with the government's opposition and supplemental opposition, has been filed in 03-CR-30008-MAP. The motion, however, appears to apply more properly to 04-CR-30026-MP, since it pertains to evidence seized following the return of the earlier indictment and seeks to exclude evidence that appears to be relevant only to the later indictment.

The defendant has moved to suppress the physical objects seized as a result of the execution of the search warrant, on the ground that the observations by the agents during defendant's arrest were made in violation of the Fourth Amendment. Because the court finds that these observations exceeded the permissible boundaries established by the Fourth Amendment, and that the items seized pursuant to the search warrant were the fruit of this violation, the Motion to Suppress will be allowed.

In addition, the court will suppress a statement made by the defendant on the ground that it also derived from the constitutional violation. In light of the unavailability of the evidence obtained as a result of the search warrant, the court will order the Government to submit a notification within thirty days with regard to its intent to go forward on 04-CR-30026-MAP.

II. FACTUAL BACKGROUND.

The defendant Charles Winston was indicted on October 14, 2003 as part of a second superceding indictment charging him, along with many others, with conspiracy to possess with the intent to distribute and possession with intent to distribute various controlled substances. On the same day he was indicted, a warrant was issued for his arrest.

The next day, October 15, 2003, a team of law enforcement agents went to the address where Winston was thought to be living, 110 Carr Street in Springfield, Massachusetts. Upon arrival at roughly 10:15 a.m., the agents recognized the defendant's distinctively painted blue BMW parked in front of the residence. Surveillance followed for a substantial period, during which time the agents hoped that the defendant would leave the residence and depart in his vehicle, giving them an opportunity to apprehend him in relative safety.

After the defendant failed to appear, a group of agents was detailed to go to the back of the house to cut off any escape, while

others approached and knocked on the front door. The supervising officer during the arrest was DEA Agent Donald Wales. He had had glimpses of the defendant on prior occasions and knew generally what he looked like. One of the officers covering the back of the residence was Patrick Burns, an ATF agent, who knew both the defendant and his girlfriend well, since he had seen the two of them during an earlier arrest of the defendant.

The residence at 110 Carr Street was a duplex, with Unit 110A on the right side and 110B on the left. Agent Wales approached Unit 110A and knocked on the door. When Elizabeth Ortiz answered, he asked her whether she knew who drove the BMW parked in front of the residence. Ms. Ortiz denied any knowledge of who drove the BMW but suggested that the agents might want to check with the resident of Unit 110B. She then closed the door, and the agents moved to the lefthand side of the duplex. They knocked on the door of 110B and waited four or five minutes but received no response.

Agent Wales then knocked on the door of 110A again. About this time, Agent Burns, concerned about the delay, came around to the front of the house and arrived just as Elizabeth Ortiz was once more opening the door. Burns immediately recognized Ortiz as Winston's girlfriend and confronted her with this knowledge. Ortiz stammered and became visibly anxious, at which point Wales drew the conclusion (correct, as it turned out) that she had been misleading the agents about the defendant's presence. The officers pushed past her into the house to effectuate the arrest warrant.

State Trooper Martin, a task force agent assisting in the arrest, immediately moved off to the right, and proceeded through the living room and the kitchen towards the basement. Agent Wales started up the stairs, which were directly in front of the door, calling out "Chuck?" to which a voice from upstairs

answered, "Up here."

Agent Wales proceeded cautiously up the stairs with his gun drawn and saw the defendant Winston on the landing holding a cell phone. In response to the agent's instruction, the defendant immediately dropped the cell phone, placed his hands against the wall, and was handcuffed.

Agent Burns, waiting at the bottom of the stairs, noticed a toddler approximately fourteen months old standing precariously at the top of the steep stairway. Concerned that the child might be nudged over the edge of the stairs during the arrest, he quickly went up to the second floor and brought the child downstairs.

With the child out of harm's way and the defendant in custody, Agent Burns followed Task Force Agent Martin down into the basement. From the top of the stairs leading to the basement, Agent Burns could see only the opposite wall. After descending the stairs, he proceeded to the left through a laundry area into another part of the basement around to the side and back of the furnace. At this spot Agent Martin pointed out to Agent Burns a safe that he had located under a blanket or comforter near the furnace. The safe was approximately twenty-four inches high by seventeen inches wide by twenty-seven inches deep. It had been entirely covered by the comforter or blanket at the time Agent Martin first encountered it.[2]

Meanwhile upstairs, Agent Wales and other officers were in the process of completing the apprehension of the defendant. By moving promptly up the staircase and quickly locating the defendant, the agents had him under control within fifteen to twenty seconds after they first set foot inside the residence.

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[2] This description of the premises is based on the court's observations during a view of 110 Carr Street taken during the hearing on the motion to suppress.

Agent Wales had the practice, even in situations where he was generally familiar with the arrestee, to request identification, and he did so in this case. The defendant responded that he did not have any identification on his person, but that it was in the night stand in the bedroom. Wales dispatched an officer to look for the identification, but the officer could not locate it due to a large number of clothes piled up in the room. At that point, Wales asked the defendant again where his identification was, and the defendant, now in handcuffs, indicated by pointing his shoulder to the area of the night stand. Officer Burns then pulled open the drawer in the night stand and found the defendant's wallet lying on top of a large amount of cash. The officers did not seize the cash, but merely noted it.

As they were taking the defendant downstairs, Burns indicated to Wales, in the defendant's presence, that they had found a safe in the basement. The defendant then volunteered the remark, "That's my safe." Earlier, as he was placing the defendant in handcuffs, Agent Wales had asked him whether there were any guns or drugs in the house, out of concern for the safety of the officers and the inhabitants, and the defendant had responded that there was nothing in the house of this kind, but there was a large amount of cash. Finally, on the way to the squad car, the defendant asked what he was being arrested for. When the officers told him it was for drugs, he stated, "I don't do that anymore; I'm in real estate."

Notably, during the course of the defendant's arrest no agents found it necessary to perform a protective sweep of the second floor area, even after the defendant was placed into custody. In addition, none of the agents shouted down into the basement before entering it to request that anyone down there show himself and come upstairs.

After transporting the defendant from the scene, the

officers applied for a search warrant of the residence based upon their observations of the safe and of the large amount of cash in the night stand. The search warrant issued that day. As a result, the safe was opened, and two grocery bags containing currency in the amount of approximately $58,000 were found.[3] The officers also noticed a strong smell of cocaine inside the safe, seized a .45 caliber pistol and ammunition in a room adjoining the defendant's bedroom, and took into custody the currency in the night stand and a scale with white powder residue found in the bedroom closet.

III. DISCUSSION.

The defendant contends that the court should suppress the evidence obtained pursuant to the search warrant, as well as the statements made to the officers at the time of his arrest, because the search warrant was issued on the basis of evidence observed by the arresting officers in violation of the Fourth Amendment.

In the course of placing a suspect under full custodial arrest, it is permissible for officers to conduct a limited, warrantless search of the suspect's person. The scope of this search may extend to the area "'within [the suspect's] immediate control' -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). The extent of this permissible search area is sometimes referred to as the defendant's "wingspan."

Furthermore, when necessary, officers may conduct a "protective sweep" of the area to secure the safety of police officers or others. Maryland v. Buie, 494 U.S. 325, 327 (1990). To undertake a protective sweep, however, the officer must possess

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[3] The agents could not physically seize the safe because it was bolted to the floor; they brought a locksmith to the premises who opened the safe so that they could view and seize its contents

"'a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing,' that the area swept harbored an individual posing a danger to the officer or others." Id. (quoting Michigan v. Long, 463 U.S. 1032, 1049-50 (1983)) (internal quotations omitted). Even where a protective sweep is reasonably done, "the scope and manner of [the] search [are] 'strictly circumscribed by the exigencies which justify its initiation.'" U.S. v. Irizarry, 673 F.2d 554, 558 (1st Cir. 1982).

Applying these principles to the search conducted during the arrest of the defendant, the court must conclude that the cash in the night stand and the safe in the basement were observed in violation of the Fourth Amendment.

The search of the night stand cannot be justified as incidental to the arrest nor by any doctrine of inevitable discovery. At the time the request for identification was made, the officers had the defendant secured and in custody in the hallway. While it was not impermissible for the officers to request Mr. Winston's identification upon apprehending him, no exception to the Fourth Amendment permits them to initiate a general search for identification when it is not on the arrestee's person. Moreover, since the defendant was apprehended in the hallway, his wallet cannot be considered as within his "wingspan." His indication in response to questioning of where his wallet could be found cannot be construed as a consent to search.

Neither does the doctrine of inevitable discovery protect the search of the night stand. Though "evidence which has been illegally obtained or derived from illegally obtained evidence must be suppressed," U. S. v. Silvestri, 787 F.2d 736, 740 (1st Cir. 1986), if the government can show by a preponderance of the evidence that the discovery of the evidence was inevitable, then the evidence will not be suppressed. See id. at 744, 746 (suggesting

that courts focus their analysis on independence and inevitability).[4] In this case, sufficient support for the application of the inevitability exception is lacking. As the First Circuit noted in Silvestri, "where a warrant is only sought after an illegal search reveals evidence of criminal activity, [the court begins] to worry whether the later warrant is truly inevitable and independent of the police misconduct." Silvestri, 787 F. 2d at 745 (discussing the Eleventh Circuit case, U.S. v. Satterfield, 743 F.2d 827 (11th Cir. 1984)). The basis of the search warrant obtained here by the officers was, in part, their discovery of the cash in the night stand. There is simply not enough evidence to support the contention that, had the agents sought a warrant without using the cash in the night stand as a basis, a warrant would have issued.

Likewise, the discovery of the safe in the basement was not made within the bounds of the Fourth Amendment. The entry into the basement and the removal of the cloth that concealed the safe in the far corner cannot be justified by any attempt to locate the defendant (who was under the control of the agents within seconds) or by any claim that a "protective sweep" was needed. The agents had no need to search the basement for the defendant, having taken him into custody immediately upon entering the apartment. The defendant did not deny that he was the person the agents sought.

In addition, there is no reasonable basis for a protective sweep of the basement. The agents spent at least an hour observing

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[4] The First Circuit has focused on three questions to resolve the issue of inevitable discovery: "first, whether 'the legal means [are] truly independent'; second, whether 'both the use of the legal means and the discovery by that means [are] truly inevitable'; and, third, whether 'the application of the inevitable discovery exception either provide[s] an incentive for police misconduct or significantly weaken [s] fourth amendment protection.'" U. S. v. Scott, 270 F.3d 30, 42 (1st Cir. 2001) (citing Silvestri).

United States Court of Appeals
For the First Circuit

No. 05-1312

UNITED STATES

Appellant

v.

CHARLES WINSTON, JR., a/k/a
Sweet Chuck

Defendant - Appellee

Before

Boudin, Chief Judge,

Torruella and Selya, Circuit Judges,

Cyr and Stahl, Senior Circuit Judges,

Lynch, Lipez, and Howard, Circuit Judges.

ORDER OF COURT
Entered: June 16, 2006

The Federal Public Defender for the District of Massachusetts, New Hampshire, and Rhode Island's motion to file as an amicus brief in support of rehearing en banc is granted.

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been

submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

LIPEZ, Circuit Judge, dissenting. I respectfully dissent from the denial of en banc review as to the protective sweep issue.

By the Court:

Richard Cushing Donovan, Clerk.

[cc: Thomas J. O'Connor, AUSA, Ariane D. Vuono, AUSA, Dina Michael Chaitowitz, AUSA, John-Alex Romano, Esq., David P. Hoose, Esq., Miriam Conrad, FPD, Judith H. Mizner, AFPD]